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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 425

THE HOMEWORKERS' HANDICRAFT CO-OPERATIVE AND MILLHISER BAG COMPANY, INC., PETITIONERS,

VS.

WILLIAM R. McCOMB, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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INDEX

PAGE

History of the Case ---------- 2
Jurisdiction of This Court ---------- 2
Statutes Involved ---------- 2
Summary Statement of Matters Involved ---------- 2
Holding in District Court ---------- 7
Opinion of the Court of Appeals ---------- 7
Questions Presented ---------- 8
Reasons Relied on for the Allowance of the Writ ---------- 9

I. Importance of the Questions Presented, Which Have Not Been, But Should Be, Settled by This Court ---------- 9

II. The Opinion Decides a Federal Question in a Way Probably In Conflict with Applicable Decisions of This Court ---------- 16

III. The Opinion Is in Direct Conflict with Decisions of Other Courts of Appeals on the Same Matters 17

Supporting Brief ---------- 22

Table of Cases

Associated Press v. United States, 326 U. S. 1 ---------- 23
Boutell v. Walling, 327 U. S. 463 ---------- 17
Cooperative Association v. Jones, 185 N. C. 265, 117 S. E. 174 ---------- 24
Darr v. Mutual Life Ins. Co., 2 Cir., 169 F. 2d 262 ---------- 30
Fleming v. Palmer, 1 Cir., 123 F. 2d 749 ---------- 23
Frost v. Corp. Commission, 278 U. S. 515 ---------- 16
Gemsco v. Walling, 324 U. S. 244 ---------- 27
Glenn v. Beard, 6 Cir., 141 F. 2d 376 ---------- 6, 20
Harrison v. Greyvan Lines, Inc., 331 U. S. 704 ---------- 17
Hecht Company v. Bowles, 321 U. S. 321 ---------- 30
Liberty Warehouse Co. v. Burley Tobacco Growers Co-op. Marketing Assn. (1928) 276 U. S. 71 ---------- 12, 16

INDEX (Cont'd.)

PAGE

Liggett Co. v. Lee, 288 U. S. 517 ---------- 17
Meredith v. Winter Haven, 320 U. S. 228 ---------- 30
McComb v. Frank Scerbo & Sons, Inc., 2 Cir., 176 F. 2d—— ---------- 29
N. L. R. B. v. Hearst Publications, 322 U. S. 111 -- 15, 28
Party Cab Company v. U. S., 172 F. 2d 87 ---------- 27
Rutherford Food Corp. v. McComb, 331 U. S. 722 ---------- 15, 17, 26
U. S. v. Silk, 331 U. S. 704 ---------- 15, 17, 26, 28
Walling v. American Needlecrafts, Inc., 6 Cir., 139 F. 2d 60 ---------- 28
Walling v. Buettner & Co., 7 Cir., 133 F. 2d 306 ---- 28
Walling v. Plymouth Mfg. Corp., 7 Cir., 139 F. 2d 178; 322 U. S. 741 ---------- 17, 23
Walling v. Portland Terminal Co., 330 U. S. 148--- 17, 29
Walling v. Twyeffort, Inc., 2 Cir., 158 F. 2d 944 ---- 28

STATUTES

Section 1254(1) of the Judicial Code, as amended, Title 28 U. S. C., Sec. 1254(1), Act of June 25, 1948, C. 646, 62 Stat. 992---------- 2

Sections 3(a), 3(d), 3(e), 3(g), 6(a), 11(c) and 15(a) of the Fair Labor Standards Act of 1938 (Act of June 25, 1938, Ch. 676, 52 Stat. 1060; U. S. C., Title 29, Sec. 201, et seq.), and of Sections 2, 4, 9 and 10 of the Portal-to-Portal Act of 1947 (Act of May 14, 1947, Ch. 52, 61 Stat. 84, U. S. C., Title 29, Sec. 296, et seq.)---------- 2

MISCELLANEOUS

Columbia Law Review, February 1923 ---------- 24
The Law of Cooperative Marketing, by Evans and Stockdyk ---------- 25

INDEX (Cont'd.)

PAGE

Law and Contemporary Problems, Volume 13, No. 3 (Duke University School of Law—published in 1948) ---------- 10, 24
29 Minn. Law Review 343 (May 1945) ---------- 24
Bulletin No. 922, U. S. Department of Labor, Bureau of Labor Statistics, "Consumers' Cooperatives and Credit Unions: Operations in 1946" ---------- 10
Wage and Hour Manual, Cumulative Edition 1944-45 ---------- 23

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your Petitioners, The Homeworkers' Handicraft Cooperative and Millhiser Bag Company, Inc., pray for a writ of certiorari to the Court of Appeals for the Fourth Circuit to review the decree of that court entered 22 August 1949 (R. 169), reversing a decree of the District Court entered 30 December 1948 (R. 17).

A certified transcript of the record in the case, including the proceedings in the Circuit Court of Appeals, has heretofore been furnished in compliance with Rule 38 of this Court.

HISTORY OF THE CASE

This action was instituted in the United States Court for the Middle District of North Carolina, Greensboro Division, by Respondent under Section 17, 29 U. S. C., 52 Stat. 1060 to restrain Petitioners from violating Sections 15(a) (1), 15(a) (2) and 15(a) (5) of the Fair Labor Standards Act of 1938 (R. 21-23).

A trial of the action was had on 20-21 September 1948. Judgment was entered in the District Court on 30 December 1948, dismissing the action (R. 17). The trial judge made findings of fact and conclusions of law (R. 3-17), but did not file a written opinion.

Upon appeal to the United States Court of Appeals for the Fourth Circuit, decree was entered 22 August 1949, reversing the decree and remanding the cause with direction to grant the injunction (R. 169). The opinion of the Court of Appeals is reported at 176 F. 2d_____.

JURISDICTION OF THIS COURT

The jurisdiction of this Court is invoked under Section 1254(1) of the Judicial Code, as amended, Title 28 U. S. C., Section 1254(1), Act of June 25, 1948, C. 646, 62 Stat. 992.

STATUTES INVOLVED

The case presents the proper construction of Sections 3(a), 3(d), 3(e), 3(g), 6(a), 11(c) and 15(a) of the Fair Labor Standards Act of 1938 (Act of June 25, 1938, Ch. 676, 52 Stat. 1060; U. S. C., Title 29, Sec. 201 *et seq.*), and of Sections 2, 4, 9 and 10 of the Portal-to-Portal Act of 1947 (Act of May 14, 1947, Ch. 52, 61 Stat. 84; U.S.C., Title 29, Sec. 296, *et seq.*)

SUMMARY STATEMENT OF MATTERS INVOLVED

Millhiser Bag Company, Inc., manufactures cloth bags, some of which require the insertion of a drawstring, and are

used as containers for granulated tobacco, kodak film, etc. Since 1869 the drawstrings have been inserted by persons in their homes in North Carolina and Virginia (R. 8).

Prior to 1938 Millhiser, after performing the manufacturing process of making drawstring bags, delivered same to distributors who in turn placed the bags in the homes of bag stringers. These bag stringers would insert the drawstring in the bags in their homes, return same to the distributor, and receive an agreed piece rate for the bags strung (R. 4).

In October 1938, a Service Corporation was independently organized and it contracted with Millhiser to handle the distribution of its bags to stringers in their homes. For such service the corporation charged the bag companies the piece-work rates then in effect, plus an added 15c per thousand bags (R. 4-5).

The Fair Labor Standards Act of 1938 became effective in October of that year and there was uncertainty as to whether the bag stringers would be considered employees of the Service Corporation. The attorney and principal stockholder of the Corporation "was unwilling to assume the risks involved in a possible future ruling by the courts that the bag stringers were the employees of the Service Corporation. Accordingly, he dissolved the Virginia-Carolina Service Corporation on 11 April 1941" (R. 5-6).

In May 1941 approximately 200 women bag stringers who lived in the Richmond, Virginia area met to discuss the situation that faced them, namely, the cessation of bag stringing because of the dissolution of the Service Corporation. Upon inquiry "some of the ladies present inquired if there were not some way that they could continue to get bags as many of them were very anxious to continue stringing bags. Mr. Bronson then stated that the matter could be handled through the formation of a cooperative, and told them that a similar project had been successfully used by a group of people living in the state of Maine. Mr.

Bronson offered his advice and help in the formation of such a cooperative if the bag stringers desired. After discussion, a committee of stringers was elected to consult with Mr. Bronson and were voted authority to form a cooperative. This was done, and the Homeworkers' Handicraft Cooperative (herein referred to as Cooperative) was duly formed and a charter was issued by the State of Virginia on 5 June 1941. A board of directors was elected and they adopted a set of by-laws to govern the corporation. John E. Slater was appointed General Manager. During the first six weeks of its operations, the members strung 30,585,039 bags. The Cooperative was organized independently of Millhiser and Chase, or any of the officers or agents of said Companies; the Cooperative has operated since its inception independently of Millhiser and Chase, and has dealt with these Companies at arms length at all times. Millhiser has never supplied either of these Companies with capital, nor furnished them with the services of employees" (R. 6-7). There are between 1800 and 2,000 members of the Cooperative. Each member is entitled to cast only one vote irrespective of the number of shares held. Patronage dividends have been made on the basis of work performed and not upon capital invested. The Cooperative establishes the prices that are paid by Millhiser for the stringing of bags. The Cooperative is organized, conducted and operated along the lines of a bona fide cooperative (R. 6-8). At the time a bag stringer applies for membership in the Cooperative, he or she signs an agreement with the Cooperative to string bags on his or her own behalf and return them upon completion to the Cooperative (R. 115). Between 1 September 1941 and 31 March 1948, the Cooperative has paid to its members for stringing bags the sum of $616,542.71. One member has been paid as much as $5,560.22 while another has earned as little as $18.00. The membership is composed of men and women whose ages range from twenty to eighty years;

some are physically normal but many are handicapped by blindness and other infirmities (R. 10, 126).

The Cooperative collects bags from Millhiser that are ready to be strung and takes them to its depots where they are distributed to members of the Cooperative. Millhiser has no knowledge of who will receive the bags for stringing, and has no right to direct to whom they will be distributed. The members of the Cooperative never receive their bags from Millhiser's plant, factory or agent, nor do they ever return the bags after stringing them to Millhiser's plant, factory or agent. The uncontroverted findings of fact by the trial court show (R. 9-11):

> "9. The members of the Cooperative perform all of their operations on the bags in their homes. The distance from Millhiser's plant and the Cooperative's office in Richmond to the homes of the various members of the Cooperative is great, ranging from one to over 300 miles; the daily number of hours worked by the members and the details of their work could not be within the first-hand knowledge of Millhiser or the Cooperative . . . Neither Millhiser nor the Cooperative exercises any control over the premises where the stringing operations are performed, to-wit, the homes of the members. No work by a member of the Cooperative is performed alongside admitted employees of Millhiser or the Cooperative.
>
> "10. The operations performed by the members of the Cooperative are not skilled. . . Neither Millhiser nor the Cooperative supplies tools or equipment used by the members in their operations. . .
>
> "11. Neither Millhiser nor the Cooperative exercises control over the time within which the operations of a member are to be performed . . . The work is performed in the home of the members at odd times, and at times when household duties, farm duties, and other jobs permit. . .

"12. The members of the Cooperative perform the operations in their homes without supervision, direct or indirect, of Millhiser or the Cooperative. No written or oral instructions, and no direction is given by Millhiser or the Cooperative to the members as to the result to be accomplished by their work, nor as to the details and means by which that result is to be accomplished. . .

"13. Except in a very few instances, the members are not dependent on the stringing of bags for a livelihood. The operations do not occupy the members' full day. The stringing is incidental to the members' primary household work, farm duties, and other work. In most instances the members string only at odd moments and not for continuous periods of an hour or more. For most of the members, the stringing of bags is a pastime from which additional income is derived to supplement regular income. For many, it provides relaxation and amusement.

"14. Millhiser has neither the right nor the power to discharge nor to recommend the discharge of any member of the Cooperative. While the Cooperative may, under its by-laws, and in a limited set of circumstances, expel a member for violation of its rules and regulations, this has never been done."

At all times Respondent has been kept fully informed of the operations of the Service Corporation, of Millhiser, and of the Cooperative. During the past ten years the Respondent has made periodic inspections of Millhiser's operations for compliance with the Fair Labor Standards Act and the Walsh-Healey Act. In March 1944 the Sixth Circuit Court of Appeals rendered its decision in *Glenn v. Beard,* 141 F. 2d 376, holding that homeworkers, who made comforters and quilts under circumstances similar to those involved in the instant case, were not the employees of the

company that manufactured the materials which were stamped with designs and specifications, and that accordingly they were not subject to the provisions of the Social Security Act. On 5 January 1946 the Commissioner of Internal Revenue, Treasury Department, after an investigation of the operations of the bag stringers in the instant case, and in reliance on the *Glenn* ruling, determined that these bag stringers were not employees of the Cooperative within the purview of the Social Security Act. No assertion has been made by the Treasury Department that the bag stringers are employees of Millhiser (R. 13).

Holding In District Court

The trial court, after hearing the testimony and considering the documentary evidence, concluded that the bag stringers were not employees of Millhiser or of the Cooperative and therefore that neither corporation had violated the provisions of the Act as alleged in the complaint (R. 15-17). The trial court further held that the Cooperative was a bona fide company, owned and controlled by its members, the bag stringers, not on the basis of invested capital but as one of the rights of membership; that the basic legal and economic principles of the cooperative scheme had been fulfilled; and that the bag stringers, being members of a true cooperative, are not its employees but its owners and controllers (R. 15). Finally, the trial court was of the opinion that the relief sought by the plaintiff against the defendants was barred by its acquiescence and laches and that it would be inequitable to grant the relief requested (R. 16-17).

Opinion of the Court of Appeals

No finding of fact of the trial court was rejected or controverted by the opinion in the Court of Appeals. Notwithstanding, the Court of Appeals reversed the decree of the District Court on the ground that the bag stringers were employees of Millhiser and such status had not been affect-

ed by the organization of the Cooperative. The Court of Appeals also rejected the equitable defenses advanced by the Petitioners and adopted by the trial court.

QUESTIONED PRESENTED

1. Can the members, owners, controllers and operators of a bona fide cooperative company in their performance of services and production of goods for the association be classified as "employees" under the provisions of the Fair Labor Standards Act of 1938? Specifically, are the owners and controllers of a bona fide cooperative company, duly engaged in the business of obtaining textile bags for the insertion of drawstrings by its members and the subsequent performance of the operations by them, "employees" of (a) the cooperative or (b) the manufacturer of the bags, within the meaning of the Act?

2. Can the impact of the Fair Labor Standards Act of 1938, as applied to workers who insert drawstrings in textile bags for the ultimate benefit of a bag manufacturer, be avoided by the workers voluntarily forming a bona fide cooperative association for a recognized business purpose of obtaining materials and supplies from the bag manufacturer and then performing services and producing goods for their cooperative?

3. Are bag stringers who, for the most part "are not dependent on the stringing of bags for a livelihood" and for many of whom the stringing "provides relaxation and amusement" as a pastime, and who string bags only in their homes at odd moments, "employees" of a bag manufacturer that exercises no control or supervision over them solely because they are "humble" and "are unskilled and unorganized manual laborers performing a necessary service in the manufacture of bags"?

4. Where companies in good faith conform with and rely upon the administrative ruling of the Commissioner of Internal Revenue, Treasury Department, and the non-enforce-

ment policy of the Wage and Hour Division, Department of Labor against them or against the class of employers to which they have belonged, is Respondent thereby barred from obtaining injunctive relief against them by the provisions of the Portal-to-Portal Act, acquiescence, laches, or estoppel?

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

I.

Importance of the Questions Presented, Which Have Not Been, But Should Be, Settled by This Court.

A. Sections 6(a) and 11(c) of the Fair Labor Standards Act of 1938 impose certain duties upon "every employer," and Section 15(a) makes it unlawful for "any person" to transport any goods in the production of which any "employee" was employed in violation of the Act. Petitioners contend that "the bag stringers, being members of a true cooperative, are not its employees, but its owners and controllers." The District Court agreed with this position (R. 16). The Court of Appeals disagreed, reasoning that "the Cooperative merely assists the workers in their dealings with the bag companies and its intervention should no more affect their status as employees than if it were a labor union bargaining collectively in their behalf" (R. 166) and that the Cooperative is "nothing more than an agency for the dealings had between them (the bag companies) and the homeworkers" (R. 167).

The reported cases show that the relationship existing between a cooperative and its members, and the legal consequences arising from this relationship, has been noted in very few courts and has never been decided by this Court.

The growth of cooperatives in this country during the last decade or so has been enormous:

> ". . . In this country the marketing and purchasing cooperatives of the farmers have enjoyed the benefits of

the current and widespread prosperity of agriculture. In addition, rising prices and shortages in housing, medical care, and consumer goods and services have intensified public interest in cooperative ventures in all these fields and have led to many new and interesting developments. (p. 391)"

"Almost every state in the Union has statutes expressly providing for the organization of cooperative corporations (p. 534) . . . The 1946 volume of cooperative business estimated to have been $12,060,185,000. (p. 431) . . . In the past century the consumer cooperative movement has spread all over the globe. The outbreak of World War II found it with well over a hundred million members. (p. 447) . . . From a third to a half of American farmers are today cooperative members, and many of them belong to two or three such organizations serving different rural needs (p. 458) . . . There are over 11,700 credit unions now functioning in the United States and Canada (p. 469) . . . According to the 1940 census there were 4,356 mutual non-profit irrigation companies in the country. (p. 470)."—*Law and Contemporary Problems,* Volume 13, No. 3, published in 1948 by Duke University School of Law, devoted entirely to "Cooperatives."

Bulletin No. 922, U. S. Department of Labor, Bureau of Labor Statistics entitled "Consumers' Cooperatives and Credit Unions: Operations in 1946" states that: "Both membership and business of consumers' cooperatives reached an all-time peak in 1946, in spite of difficulties. Retail distributive business exceeded three-fourths of a billion dollars and the service business of local associations surpassed 15 million dollars. The stores as a group showed the greatest increase in dollar volume of business since 1942; and the petroleum associations had the greatest increase since 1941, . . ." This bulletin further gives the statistics as to estimated

membership and business of consumers' cooperatives in 1946 as follows:

Type of association	Total number of associations	Number of members	Amount of business
Local associations			
Retail distributive associations:			
Stores and buying clubs	3,000	1,080,000	$500,000,000
Petroleum associations	1,500	965,000	300,000,000
Other [1]	65	26,000	9,225,000
Service associations:			
Rooms and/or meals	200	22,000	3,600,000
Housing	125	10,000	[2] 3,000,000
Medical and/or hospital care:			
On contract	55	110,000	1,750,000
Own facilities	50	55,700	[3] 4,000,000
Burial: [4]			
Complete funeral	40	36,000	310,000
Caskets only	4	1,700	6,500
Cold storage [5]	175	87,500	2,000,000
Other [6]	125	25,000	750,000
Electric light and power associations [7]	830	[8] 1,596,000	84,930,000
Telephone associations (mutual and cooperative)	33,000	675,000	10,000,000
Credit unions [9]	8,972	3,013,792	289,993,160
Insurance associations	2,000	[10] 11,000,000	[11] 205,000,000
Federations		**Member associations**	
Wholesales:			
Interregional	1	22	16,900,000
Regional	25	4,025	[12] 212,450,000
District	11	280	[12] 9,650,000
Service	18	1,498	842,700
Productive	15	253	38,350,900

[1] Such as consumers' dairies, creameries, bakeries, fuel yards, lumber yards, etc.
[2] Gross income; excludes new associations which had no income.
[3] Excluding new associations with no income.
[4] Local associations only; excludes associations of federated type (which are included with service federations) or funeral departments of store associations.
[5] Excludes cold-storage departments of other types of associations.
[6] Such as water supply, cleaning and dyeing, recreation, broadcasting, printing and publishing, nursery schools, etc.
[7] Mostly REA associations, data for which were supplied by the Rural Electrification Administration.
[8] Number of patrons.
[9] Actual figures; not estimates.
[10] Policyholders.
[11] Premium income.
[12] Includes wholesale, retail, and service business.

Law and Contemporary Problems, supra, notes, however, that:

> "Cooperatives have developed as an outgrowth of definite social needs. Together with the trade union and the business corporation, the cooperative has arisen out of modern industrial and economic activities as an adjustment of human relations to new situations. Unfortunately, the development of the law has not kept pace with the growth of cooperatives. Even today, legal theory lags, in many respects, far behind the present status and needs of cooperatives, . . . (p. 392) . . . Every arrival in the business arena bringing with it a new idea has been compelled to justify its existence not only in practice but also under the scrutiny of the courts. Not all have survived, but the cooperative corporation has made constant progress and now is so firmly established that it has come to be regarded as a permanent part of the American economic system. (p. 473)."

Hence, a resolution by this Court of the problem will have immediate purpose far beyond the particular facts and parties here involved.

This Court has given recognition to, and approval of, the cooperative movement insofar as constitutional requirements are concerned. In *Liberty Warehouse Co. v. Burley Tobacco Growers' Co-op. Marketing Assn.* (1928) 276 U. S. 71:

> "These statutes reveal widespread legislative approval of the plan for protecting scattered producers and advancing the public interest. Although frequently challenged, we do not find that any court has condemned an essential feature of the plan, with the single exception of the Supreme Court of Minnesota in the above cited case."

The question as presented in the instant case has not been determined by any decision of this Court. It is important to that large segment of our economic society composed of members of bona fide cooperatives that the Court should hear the petition.

The question as to whether the Cooperative is the "employer" of its members, or whether the members are "employees" of the manufacturer of the materials, or whether the Cooperative is a "person," is squarely presented for determination by this Court because the precise principle was stated and adopted by the District Judge in his Conclusions of Law (R. 16), which conclusion and the judgment based thereon was reversed by the opinion of the Court of Appeals for the Fourth Circuit (R. 167).

B. Section 3(d) of the Act defines "employer" as "any person acting directly or indirectly in the interest of an employer in relation to an employee," and Section 3(e) defines "employee" as including "any individual employed by an employer," and Section 3 (g) defines "employ" as including "to suffer or permit to work." Obviously these phrases are intended to have special meanings. On this the decisions are agreed. But the Petitioners contend that the language should not be interpreted to mean the insertion of drawstrings in bags, performed in the home for relaxation and amusement, and not as a means of livelihood. The reported cases show that the relationship of homeworkers to certain industries has often arisen in lower courts but this is the first case where the operation performed in the home is frequently by stringers who "are old, infirm, blind, crippled or otherwise incapacitated from performing other types of work" (R. 10) and where "the stringing is incidental to the members' primary household work, farm duties, and other work . . . For most of the members, the stringing of bags is a pastime from which additional income is derived to supplement regular income. For many, it provides relaxation and amusement" (R. 11).

Because a large number of persons now experience considerable leisure time due to an ever shortening work week, early retirement from industrial employment, labor saving devices in and around the home, and incapacity to work because of disabilities incurred for various reasons, the question for determination will arise even more frequently in the future; hence, a resolution by this Court of the problem will have immediate purpose far beyond the homeworkers and particular facts here involved. The precise question is presented in this case, and has never been decided by this Court, as to whether it is the purpose of the Act to include within its provisions this large class of persons and to thereby eliminate their earnings obtained from simple operations performed in their free time as a means of relaxation and amusement. The Petitioners contend that the Act was never intended to cover persons such as involved in this case who have no relationship at all with the alleged employer other than to perform a simple operation on materials previously manufactured by that corporation. The Petitioners point out that no sweatshop labor is involved, the work cannot be regarded as an intrusion upon the family life, and the work performed is not in competition with bag stringers in a factory or elsewhere and, accordingly, the standards of no worker have been lowered by this economic situation. It is important to the large class of persons who perform part-time operations of an unskilled nature in their homes, and to the manufacturer of the materials on which these operations are performed, that the Court should hear this petition. The question is squarely presented for determination here because the District Judge was of the opinion that the bag stringers are not the employees of Millhiser or the Cooperative, which opinion, and the judgment based thereon is reversed by the opinion of the Court of Appeals for the Fourth Circuit. The Court of Appeals recognizes that "the work is done in their own homes without the supervision and direction of the bag companies" (R. 162), but it

apparently concludes that the bag stringers are employees simply because the bag companies benefit by their operations and because of the class of persons involved. Thus, the Court of Appeals thinks it is controlling that the bag stringers "are not engaged in an independent calling, but are performing unskilled manual labor" (R. 160); that their operations are "so simple that it requires no supervision" (R. 160); that the bag stringers are "mere laborers compensated on a piece-work basis" (R. 160); that "the law of independent contractors has an important place in the law, but surely it was never intended to apply to humble employees of this sort" (R. 160); the "homeworkers here involved require the protection of the Act and that the protection should be given them" (R. 162); that the bag stringers "are unskilled and unorganized manual laborers performing a necessary service in the manufacture of bags" (R. 162); and that "in the case last cited, Judge Kennedy referred to our statement in the *Vogue* case that the law of independent contractors was never intended to apply to humble employees of this sort" (R. 164-5).

If the skill and nature of the work is the test for determining whether a person is an employee or not under the Act, then every manufacturer should know it. If it is not the law, then the uncertainty created by the conflict with other decisions and with common sense should be promptly dispelled. The question involved was not determined by this Court in the decision of this Court in *N. L. R. B. v. Hearst Publications,* 322 U. S. 111; *Rutherford Food Corp. v. McComb,* 331 U. S. 722; *U. S. v. Silk,* 331 U. S. 704.

C. The Portal-to-Portal Act of 1947 (R. 23-25) provides in Section 9 that reliance by an employer upon an administrative ruling or interpretation of an agency of the United States, or upon any administrative practice or enforcement policy of any such agency with respect to the class of employers to which it belonged, shall be a bar to any action or proceeding commenced prior to, or on, or after the

date of the enactment of the Act based on any act or omission prior to the date of the enactment. In the instant case the employer relied upon a ruling of the Commissioner of Internal Revenue, Treasury Department, that the relationship between the bag stringers on the one hand and Millhiser and the Cooperative on the other hand was not an employer-employee relationship, and conformed their operations accordingly. The actions of Petitioners have been in good faith, in conformity with and in reliance on the administrative practice or non-enforcement policy of the Wage and Hour Division, Department of Labor, wherein it refrained for more than six years from taking action against Petitioners or against the class of employers to which they have belonged.

The District Court was of the opinion that the relief sought by Respondent against Petitioners was barred by equitable defenses and by the Portal-to-Portal Act (R. 16-17). The Court of Appeals reversed this judgment on the theory that the provisions of that Act protect only as to conduct occurring prior to enactment of that statute, and "were never intended to preclude the granting of an injunction against future violations of the law" (R. 168).

The reported cases show that this question has often arisen in the lower courts, but it has never been decided by this Court. It is a question of great importance to a large class of employers and this Court should determine the correct interpretation of Section 9 of the Portal-to-Portal Act.

II.

The Opinion Decides a Federal Question in a Way Probably In Conflict with Applicable Decisions of This Court

A. The decision of the Court of Appeals on the legal relationship existing between the Cooperative and its members, the bag stringers, is probably in conflict with the following applicable decisions of this Court: *Frost v. Corp. Commission,* 278 U. S. 515; *Liberty Warehouse Co. v. Bur-*

ley Tobacco Growers' Co-op. Marketing Asso., 276 U. S. 71; *Liggett Co. v. Lee*, 288 U. S. 517—dissenting opinion of Justice Brandeis:

> "... Americans seeking escape from corporate domination have open to them under the constitution another form of social and economic control—one more in keeping with our traditions and aspirations. They may prefer the way of cooperation, which leads directly to the freedom and the equality of opportunity which the Fourteenth Amendment aims to secure. That way is clearly open. For the fundamental difference between capitalistic enterprise and the cooperative—between economic absolutism and industrial democracy—is one which has been commonly accepted by legislatures in the courts as justifying discrimination in both regulation and taxation."

B. The decision of the Court of Appeals that the bag stringers are employees of Millhiser within the meaning of the FairLaborStandards Act probably conflicts with the following applicable decisions of this Court: *Walling v. Portland Terminal Co.*, 330 U. S. 148; *Rutherford Food Corp. v. McComb*, 331 U. S. 722; *U. S. v. Silk*, 331 U. S. 704; *Harrison v. Greyvan Lines, Inc.*, 331 U. S. 704; *Boutell v. Walling*, 327 U. S. 463.

III.

The Opinion Is in Direct Conflict with Decisions of Other Courts of Appeals on the Same Matters

A. *Cooperative Question*: The opinion of the Fourth Circuit that the existence of the Cooperative does not make its members, the bag stringers, non-employees, is in conflict with the decision of the Seventh Circuit Court of Appeals on the same matter. In *Walling v. Plymouth Mfg. Corp.*, 7 Cir., 139 F. 2d 178 (reh. den. Jan. 3, 1944); cert. den. 322 U. S. 741; opinion of District Court 46 F. Supp.

433, the opinion of the Court of Appeals was written by Circuit Judge Minton, recently appointed Justice of this Court. There the court denied the Wage and Hour Administrator's request for an injunction against the cooperative-partnership. The Plymouth Manufacturing Corporation manufactured boxes and baskets in the rural community of Plymouth, Indiana, in a factory owned by the corporation. Prior to the effective date (October 1938) of the Fair Labor Standards Act it announced to all of its wage earners that it could not continue in business and comply with the requirements of the Act. It was decided to form a cooperative-partnership whereby the employees became copartners, with drawing accounts and a written agreement that they were to share in the profits, if any, of the new effort. The partnership did business under the name of Plymouth Manufacturing Company. The partnership subleased the plant from the corporation and was heavily indebted to the corporation. The former officers and directors of the corporation, except the president, continued in the new enterprise. At first the former officers and directors of the corporation were known as the senior partners and the workers in the plant were termed junior partners, and performed very much the same task and services for the company as they had performed for the corporation. The junior partners were to receive a drawing account based upon their contributions in labor or services, which were to be evaluated by the senior partners. Later, the arrangement was amended whereby all distinction between senior and junior partners was eliminated and a board of control was elected by a majority vote of all the partners and from among the partners; the agreement also provided for a distribution of the profits according to the member's contribution of labor. The opinion stated that "no fraud or duress was practiced among any member to get him to sign the agreements, but he was made to understand that the plant could operate under this cooperative plan or partnership ar-

rangement, or it would close" (p. 181). The plant did operate and had for distribution some profits which were distributed in small amounts according to the agreement. The court held, contrary to the contention of the Wage and Hour Administrator, that the Plymouth Manufacturing Company was not a partnership composed of the former officers and directors of the corporation, and therefore the wage earners were not the employees of the cooperative-partnership. As said by the District Court in that case (p. 434):

> "There was nothing illegal or immoral in this arrangement even though it was entered into by all the parties with the avowed intention to avoid the impact, on the business of the corporation, of the Fair Labor Standards Act . . . To organize the employees of the concern into a co-partnership for the purpose of continuing operations and thus afford employment for something like 100 workers, for the betterment, of not only the workers, but the community as a whole, was not only legal, but laudable."

The opinion of the Fourth Circuit in the instant case recognizes the diversity of opinion on the subject thereby created, but attempts to distinguish the *Plymouth Manufacturing Company* case in this manner:

> "There the workers were clearly engaged in manufacturing on their own account; here they are merely performing labor for the companies" (R. 167).

Petitioners contend that such a distinction is unsound. In both cases the workers earn a piece rate and in addition receive a dividend from the profit of the enterprise in accordance with the proportion of labor that they contribute.

B. *Homeworkers question*: The opinion of the Fourth Circuit that the homeworkers are employees of Millhiser that manufactures the bag is in direct conflict with the de-

cision of the Court of Appeals for the Sixth Circuit on the same matter in *Glenn v. Beard*, 6 Cir., 141 F.2d.376. There, action was brought against the Collector of Internal Revenue to recover taxes alleged to have been erroneously collected under the Social Security Act. The facts presented to the Court were that the plaintiff maintains studios in Kentucky where, for many years, she has engaged women to make comforters and quilts in their homes on farms. The plaintiff supplies the homeworkers with materials stamped with designs and specifications for the work, and delivers same with thread and instructions to the workers. The Court held:

> "There was no supervision of the work and appellee never even called at the homes of the workers to inspect the work. Payment was made when the finished product was delivered to appellee. Appellee had no right to withdraw the work from a homeworker while it was being worked upon and within the time limit provided by the contract. Other individuals and companies were engaged in the same kind of business as appellee, and often homeworkers would be engaged in working on various materials for several such concerns at the same time, interspersing such work with their household duties."

Upon the foregoing factual situation, the court stated that "we conclude that the home work in this case is not included within that service performed by an 'employee for his employer', which is the statutory criterion for application of the provisions of the Social Security Act * * * We are unable to construe the Act to include appellee within its ambit, or, within its provisions, such individuals as the independent contractors in this case."

While the *Glenn* case dealt with the Social Security Act, nevertheless, it represents a conflict in decisions of the two circuits, as this Court has held that "decisions that define the

coverage of the employer-employee relationship under the Labor and Social Security Acts are persuasive in the consideration of a similar coverage under the Fair Labor Standards Act"—*Rutherford Food Corp. v. McComb, supra.*

The effect and impact of the diversity of opinions on the subject by the Sixth Circuit and the Fourth Circuit are sharply brought into focus in this case. Thus, following the rendition of the decision in *Glenn v. Beard, supra,* by the Sixth Circuit, one agency of the United States Government, viz., the Treasury Department, reviewed the entire facts relating to the homeworkers here involved and determined that they were not employees of the Petitioners and accordingly refunded taxes previously assessed under the Social Security Act. Later, another agency of the United States Government, viz., the Labor Department, upon the same facts concluded that these homeworkers were employees of the Petitioners and instituted the instant action, which has resulted in an opinion by the Fourth Circuit that the employer-employee relationship does exist. Therefore, a determination of this conflict of opinion between the Fourth and Sixth Circuits is important not only to the Petitioners, and a large group of similar manufacturers and homeworkers, but also for the various departments of the Federal Government.

The opinion of the Fourth Circuit recognizes this diversity created by its ruling but is content to disagree with the opinion of the Sixth Circuit:

> "We stated in the Vogue opinion that we were more impressed by the soundness of the decision in the American Needlecraft case, *supra,* from which we quoted at length than by that in *Glenn v. Beard*" (R. 165).

The opinion of the Court of Appeals in this case does not point out in what manner the purpose of the Act would be served by the decision. Without stating that the uncontroverted findings of facts of the District Court are to be

disregarded, the Court of Appeals entirely brushes them aside. No element of the employer-employee relationship exists in this case and the Court of Appeals lays down no principle or rule or yardstick by which coverage can be determined. If the opinion be approved, it will introduce uncertainty of coverage that will be utterly impracticable in the administration of the Act. If the opinion be approved, it will represent a confusion as to the applicability of a cooperative enterprise to modern business needs.

WHEREFORE, your Petitioners respectfully pray that a Writ of Certiorari be issued under the seal of this Court, directed to the United States Court of Appeals for the Fourth Circuit, commanding the said Court to certify and send to this Court on a day to be designated a full and complete transcript of the record and all proceedings of the Court of Appeals had in this cause, to the end that this cause may be reviewed and determined by this Court, as provided in the Statutes of the United States, that the judgment of the Court of Appeals be reversed and the judgment of the District Court be affirmed and that Petitioners be granted such other and further relief as may seem proper.

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SUPPORTING BRIEF

A. *Cooperative Question*:

The Administrator of the Wage and Hour Division has recognized that the owners and controllers of a bona fide cooperative company are not employees within the meaning of the Fair Labor Standards Act of 1938:

> " . . . it is possible that there may be 'workers' cooperatives in which the interests of the members as workers are in all respects the same as their interests as proprietors and in which the usual characteristics of the

> employer-employee relationship do not exist, and hence in which the worker-members would not be employees within the meaning of the Act . . ." — *Wage and Hour Manual,* Cumulative Edition, 1944-1945, p. 109; W. H. Release No. R-158.

The Legislative history on the subject is negative. However when the Act was debated before Congress in 1937, and in discussing the Senate provision which would exempt a "person employed in agriculture" (Section 13 (a) (6) of the Act now exempts "any employee employed in agriculture") Senator, now Mr. Justice, Black said that the exemptions would apply to a situation where:

> "The farmer or the applegrower has a perfect right, of course, to pack his own apples either alone or in cooperation with his farming neighbors, I should say." Cong. Rec., 1937, First Session, V. 81, pp. 7657.

The decisions of this court dealing with the subject of cooperatives have been cited in the Petition, supra, II. Cf. *Associated Press v. United States,* 326 U. S. 1, where the court treated that service organization as a cooperative organized and operating on the same principles as the agricultural cooperative.

Fleming v. Palmer, 1 Cir., 123 F. 2d 749, dealt with a situation where an employer "controls the cooperative and these workers," and hence it was properly held that such workers were not exempt from the coverage of the Act. The court, however, expressly recognized that bona fide cooperatives have a place in our economic and judicial system and refers to the language of Mr. Justice Brandeis in *Liggett Company v. Lee,* supra. As previously shown, the Seventh Circuit in *Walling v. Plymouth Mfg. Corp.,* 139 F. 2d 178, expressly recognizes that the members and controllers of a cooperative-partnership are not its employees within the meaning of the Act.

State Court decisions on the subject are cited in the leading case of *Cooperative Association v. Jones,* 185 N. C. 265, 117 S. E. 174, where the North Carolina legislation on cooperatives was held constitutional, and Chief Justice Clark said for the Court:

> " 'In fact, the cooperative system is the most hopeful movement ever inaugurated to obtain justice for and improve the financial condition of farmers and laborers. The producers are paying all the costs and assuming all the responsibilities of these cooperative associations. They are taking all the risks. They are asking no assistance from the public treasury. They are forcing no one to join, and they are exacting no inordinate prices for their product.' "

Law review articles on the subject matter are *Law and Contemporary Problems,* Vol. 13, No. 3, supra; *Columbia Law Review,* February 1923, where it is stated:

> "The cooperative principle implies that the cooperating members are the real parties in interest in any transaction undertaken by their association. At no time can the association, as a corporate entity, have any interest in the marketed product adverse to the interest of the members for whose benefit the operations are conducted."

Article in 29 *Minn. Law Review* 343 (May 1945) by Randolph Paul, entitled "The Justifiability of the Policy of Exempting Farmers' Marketing and Purchasing Cooperative Organizations from Federal Income Taxes," said:

> "If the theory of cooperatives were to be completely disregarded it might be possible to characterize patron dividends either paid or withheld as income of the cooperative and to subject them to tax in the hands of the cooperatives. Such a view would, of course, do

> great violence to the basic principles upon which cooperatives are organized. The sole object of their existence is to act as agent for their patron-owners in selling and purchasing. . . . Any attempt to subject a tax in the hands of the cooperatives the sums payable as patronage dividends would ignore this basic relationship between cooperative and its owners, a relationship which, incidentally, has been widely recognized and implemented by state laws. It is well recognized that tax laws, to be administratively practical, and to avoid being oppressively burdensome, must be related to actual business practices and legal relationships."

The leading textbook on the subject is *The Law of Cooperative Marketing,* Evans and Stokdyk. This treatise was published in 1937, and it is stated in the preface thereof that "the cooperative structure is now an established economic institution . . . While those engaged in agriculture in this country have been the most active in availing themselves of the benefits of co-operation, it is noticeable that these principles are gradually being extended into other areas of our industrial life." In this treatise, the authors state:

> "Stanley Reed, now Solicitor General of the United States, in his service as General Counsel for the Federal Farm Board, contributed substantially to the cooperative marketing system through his keen understanding and nice application of the legal principles involved in it."

B. *Homeworkers Question*:

The bag stringers who, for pastime and relaxation, string the bags in their homes in odd moments are not the employees of the manufacturer of the bags whose only relationship to the bag stringers is that of the originator of a

product upon which this subsequent and independent operation is performed. Neither Congress nor this Court requires a manufacturer to completely integrate its operations; steps in the manufacturing process, whether of a skilled or a menial nature, are often performed by persons other than employees of the primary manufacturer. As said in *United States v. Silk,* 331 U. S. 704:

> "There is no indication that Congress intended to change normal business relationships through which one business organization obtained the services of another to perform a portion of production or distribution. Few businesses are so completely integrated that they can themselves produce the raw material, manufacture and distribute the finished product to the ultimate consumer without assistance from independent contractors."

Petitioners contend that, by analogy, the ruling of this court in *Rutherford Food Corp. v. McComb,* 331 U. S. 722, is apposite to the instant case. There, an employer-employee relationship was established because the work was performed on an assembly line basis; "the premises and equipment of Kaiser were used for the work. The group had no business organization that could or did shift as a unit from one slaughter house to another. The managing official of the plant kept close touch on the operation." The factual situation in the instant case is contrariwise. The contention was not there made, nor did the Court attach significance to the fact, that the persons involved were boners who were an unskilled group and who performed only manual labor.

No decision has been cited, and Petitioners have been unable to find any, to support the reasoning of the Fourth Circuit that a bag stringer should be considered an employee because the work is "unskilled manual labor" (R. 160), or because they are "humble employees" (R. 160), or

because they "are unskilled and unorganized manual laborers" (R. 162). The reasoning of the Court of Appeals on this matter is apparently predicated on the assumption that the Act requires an affirmative finding that a person is an "independent contractor" in order to find non-coverage, and hence the conclusion that an humble or menial laborer is not an "independent contractor" in the usual meaning of that term. The fallacy with this reasoning, however, is that the Act requires an affirmative finding that the persons in question are employees, and not an eliminative finding that they are not independent contractors. As aptly stated in the recent opinion of the Seventh Circuit, *Party Cab Company v. U. S.*, 172 F. 2d 87:

> "We think it should be noted that Congress by the language thus employed did not exclude from coverage merely those who have the status of an independent contractor but, without describing them, others not employees under common law rules. This observation is relevant because the problem has often been considered as though there was a single alternative, that is, that the person in question must be treated either as an employee or as an independent contractor . . . Assuming, however, that the drivers cannot be properly classified as independent contractors in the common acceptance of that term, it does not necessarily follow that they are 'employees' within the meaning of the Act. An affirmative conclusion that they are such employees cannot be arrived at by the process of elimination."

Congress did not, by the enactment of the Fair Labor Standards Act, bring within its coverage all homeworkers without regard to the circumstances of the particular case. This is made abundantly clear by the legislative history of the Act as traced in Mr. Justice Roberts' opinion in *Gemsco v. Walling*, 324 U. S. 244. For that reason, the cases of *Walling*

v. Twyeffort, Inc., 2 Cir., 158 F. 2d 944, and *Walling v. American Needlecrafts, Inc.*, 6 Cir., 139 F. 2d 60, are not determinative. Attention is directed to the fact that the latter case was decided by the Sixth Circuit prior to its decision in *Glenn v. Beard,* supra, which held that persons who performed work very similar to that of the bag stringers in the instant case were not the employees of the concern who made the patterns. On the other hand, in *Walling v. Buettner & Co.*, 7 Cir., 133 F. 2d 306, where the defendant manufactured patterns and threads for needlework performed in homes, the Court did not have to decide whether the homeworkers were employees of the manufacturer under the Act but did state that the issue "was not free from doubt."

Decisions of this Court in *N. L. R. B. v. Hearst Publications, Inc.*, 322 U. S. 111, and *United States v. Silk*, 331 U. S. 704, are predicated, to a large extent, on the "economic reality" concept as therein set forth. Congress, however, has subsequently amended those respective Acts so as to return the determination of this class of cases to the common law concepts. Thus, the National Labor Relations Act was amended on 23 June 1947, to provide in section 2(3) that "the term 'employee' . . . shall not include . . . any individual having the status of an independent contractor." The legislative history and purpose is set out in 1947 U. S. Code Congressional Service, pages 1135 et seq., and Report No. 245 of the House of Representatives states, in reference to the *Hearst Publications* case:

> "To correct what the Board has done, and what the Supreme Court, putting misplaced reliance upon the Board's expertness, has approved, the bill excludes 'independent contractors' from the definition of 'employee'."

As to the Social Security Act, Congress enacted over the President's veto, a Joint Resolution on 14 June 1948, Chap-

ter 468, Section 2(a), providing that "the term (employee) does not include any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an independent contractor." These Congressional admonitions are important in the instant case because the Court of Appeals relies heavily on decisions dealing with coverage under these Acts (R. 161, 165).

Concededly, the coverage of the Act is broad; but equally clear is the fact that the coverage is not complete. As said by this Court, in *Walling v. Portland Terminal Company*, 330 U. S. 148:

> "The definition 'suffer or permit to work' was obviously not intended to stamp all persons as employees who, without any express or implied compensation agreement, might work for their own advantage on the premises of another . . . such a construction would sweep under the Act each person who, without promise or expectation of compensation, but solely for his personal purpose or pleasure, worked in activities carried on by other persons either for their pleasure or profit."

It is submitted that the bag stringers involved in the instant case should not be construed as employees and thereby deprived as a matter of economic necessity from receiving this supplemental income for their work performed in odd moments for amusement and relaxation. There is no purpose in the Act to accomplish such a result and, as recently remarked by Judge Learned Hand: "I trust that I shall always be docile to what Congress may command; but for a result so shocking to my notions of fair play, I must find words which leave me no alternative. I do not find them; and I will not search for their equivalent in that circumambient aura, so often euphemistically described as 'the policy of the statute.' "—*McComb v. Frank Scerbo & Sons, Inc.*, 2 Cir., 176 F. 2d——.

C. *Equitable Defenses*:

The respondent is invoking the injunctive power of equity carrying with it the power to punish for contempt. This ought not to be exercised except in accordance with equitable principles. "The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims."—*Hecht Company v. Bowles,* 321 U. S. 321. Cf. *Meredith v. Winter Haven,* 320 U. S. 228. In the instant case, the Petitioners have, at all times, kept the Respondent apprised of developments and have fully informed it of all of its operations. Yet, for seven years the Respondent took no action against the operations involved. And, the Commissioner of Revenue, Treasury Department, after having fully considered the facts and circumstances surrounding the relationship between the parties and, relying upon the opinion of the Court of Appeals for the Sixth Circuit in *Glenn v. Beard,* supra, determined that the bag stringers were not the employees of Petitioners. It would be inequitable at this time to rule that the employer-employee relationship does exist.

The Portal-to-Portal Act of 1947 supplies statutory reason for the withholding of equitable relief in this case. In *Darr v. Mutual Life Ins. Co.,* 2 Cir., 169 F. 2d 262, the Court sustained the defendant's defense under the Portal-to-Portal Act that it had relied in good faith on the Wage & Hour Division's enforcement policy of treating insurance companies as not covered by the Act because not engaged in interstate commerce, holding:

> "It had been the administrative practice and enforcement policy of the Wage and Hour Division of the Department of Labor not to enforce the provisions of the FLSA in the insurance business before December 6, 1940 * * * *. The defendant acted in good faith in the belief based upon reasonable grounds that the statute

did not cover its employees; and it so acted in conformity with and in reliance upon the above-mentioned administrative practice and enforcement policy of the Wage and Hour Division."

Respectfully submitted,
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